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In the

Supreme Court of the United States

October Term, 1932.

No. 393.

FEDERAL TRADE COMMISSION,
Petitioner,

vs.

ROYAL MILLING COMPANY, ET ALS.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI.

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BAIRD-WARD—NASHVILLE

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I.

STATEMENT.

May It Please The Court:

The single question presented by the petitioner (Commission's Brief, p. 10) reduces the case to a narrow issue, and, from its standpoint, renders a full statement unnecessary.

It is, however, conceived that in view of this Court's power to examine the record for material facts not reported by the Commission (*Fed. Trade Commission* v. *Curtis Co.* (1923), 260 U. S., 568, 580; *Fed. Trade Commission* v. *Gratz* (1920), 253 U. S., 421, 427), it may be permissible to point out some additional facts, which (it is hoped) will be of assistance to the Court.

These facts are either included in the findings of the Court of Appeals (none of which are questioned in the petition), or are established by stipulation or by evidence which we regard as uncontroverted.

Additional Facts.

1. The competition involved in this case is not between makers of flour in the primary sense—i.e., grinders of wheat berries—but between makers of "self-rising" and "processed" flour. (Opinion, Rec., p. 902.)

Respondents do not deal in flour just as it comes from the grinding mill—"raw flour" as it is termed (Rec., p. 73) —nor are they in competition with anyone dealing exclusively in such flour (Rec., pp. 73, 74).

But respondents, or their predecessors in this business, many years ago put on the market and made popular a product known as "self-rising" flour. (Opinion, Rec., p. 902.)

2. "Self-rising" flour is made by machinery (Opinion, Rec., p. 902) and each of the respondents owns and operates a *bona fide* plant and machinery for carrying on the business. (Rec., p. 66, *et seq.*, p. 775 and exhibits mentioned, p. 887 and exhibits mentioned, p. 902.)

The question as to whether the operation is actually "milling" was said by the Interstate Commerce Commission in a former controversy between the "grinders" and the Nashville "manufacturers" to be "admittedly a close one, open to honest differences of opinion."

(*Nashville Flour Transit Rules* (1916), 41 I. C. C., p. 497.)

Certainly there is no case here of a merchant, without plant or machinery, who deceives the public by calling himself a "mill."

3. "Self-rising" flour is a commodity all ready for use by the housewife—that is to say, consists of flour, with salt,

soda, and phosphate added in the proper proportions, and scientifically mixed.

(Rec., p. 73, pp. 42-44, pp. 665, 666; Opinion, Rec., p. 902.)

Flour, in and of itself, is not an article fit for human consumption. (Rec., p. 43, p. 304.) It requires the addition of these leavening ingredients, in the proper proportion, and properly mixed with it.

"Self-rising" flour has two great advantages:

First: It is thoroughly and properly mixed according to exact proportions, instead of being compounded according to the rule of thumb methods which are apt to prevail in the kitchen. It produces a better food article. (Rec., p. 680, p. 82.)

Second: It is much cheaper for the housewife to buy this prepared commodity, than to buy separately flour, baking powder, and salt, from the retail grocer, paying a profit on each one. This saving is estimated in the present case by one witness as running from 80c to $4.00 per barrel of flour (Rec., p. 82), and by another as running from 40c to $2.15 per barrel, according to the quality of the baking powder and salt which the particular housewife might use. (Rec., p. 678.) This saving is, of course, produced by the fact that the makers of "self-rising" flour buy their leavening ingredients in car-load lots. (Rec., p. 678.)

4. The other product made by respondents and other Nashville producers is what is called for convenience "processed" flour—as to which the Court of Appeals said:

> "They (respondents) also market a commodity called 'processed flour.' This is a blend of two or more flours of different content with a small percentage of phosphate. Processed flour tends to counteract an overdose of soda in the hands of an unskilled housewife and restores to some extent the mineral content of the flour removed in the grinding process."
> (Opinion, Rec., p. 902.)

The addition of phosphate, for the above purposes, was a discovery of Mr. F. J. McCarthy, of Nashville,—a pioneer in the self-rising flour industry—made in 1908 (Rec., p.

70). This practice is now followed by the grinding mills. (Rec., p. 29, p. 330.)

By combining or blending two or more flours, selected according to distinct characteristics of the respective brands, a resultant flour is obtained which differs in its proportions from either of them. (Rec., p. 666, p. 72, p. 336.)

Two or more flours thus selected to produce a particular resultant, are put in the "batch mixer," together with one-half of one per cent of phosphate. This is then run through the batch mixer, draver, elevators, reels, spirals, etc., and through the packers into the bags. In other words, it is subjected to exactly the same process that is used in making "self-rising" flour—the difference being that phosphate is added instead of the leavening ingredients. (Rec., p. 666, pp. 70-72, p. 329.)

In this way respondents can produce a flour specially adapted to the making of biscuit and other hot breads.

5. The business of making "self-rising" flour was established in Nashville from small beginnings in the year 1897 (from three to five barrels per day), but has grown until the combined output of the original respondents in this proceeding, for the year 1929, exceeded $8,000,000.00.

(Rec., p. 108, p. 109, 41 I. C. C., p. 485; Rec., p. 24, p 737, p. 776, p. 813, p. 888, p. 852, p. 76.)

Nashville has become the center not of the *flour* industry in the South—but of the *self-rising* flour industry.

(Opinion, Rec., p. 902; Rec., p. 89.)

6. The grinding millers, strongly organized as the Southeastern Millers' Association (Rec., pp. 638-640, p. 669, Opinion, Rec., p. 904), are *merely the followers and imitators of respondents* and their predecessors in this industry. (Opinion, Rec., p. 903.)

"Self-rising" flour, in its early stages, was *bitterly opposed* by the grinding millers, whose salesmen claimed that it contained poisonous chemicals (Rec., p. 109, 41 I. C. C., pp. 485-6), and who made common cause with the jobbers and retailers. These latter classes opposed the product be-

cause they carried stocks of leavening ingredients,—baking powder, salt, etc.,—and made a profit on each (*Nashville Flour Transit Rules*, 41 I. C. C., pp. 485-486).

But after strongly opposing "self-rising" flour for some years, the grinding mills were finally forced by its popularity to install the necessary machinery and take up its manufacture.

(41 I. C. C., p. 485.)

7. Marketable "self-rising" flour cannot be made by the grinding miller with his grinding machinery (Rec., pp. 352, 353). It is impossible to put wheat berries and the leavening ingredients into the hopper and obtain self-rising flour. (Rec., p. 335, p. 668, p. 46, pp. 88, 89.)

Two operations are necessary. The grinding miller must first get his flour, and then, by other and additional machinery make the "self-rising" flour. (Rec., p. 335.) This latter process is the same as that used by respondents. As stated by the Court of Appeals:

> "The process used by the grinding mills is substantially the same as that of the petitioners (respondents), and requires substantially the same machinery and the same amount of time." (Rec., p. 902.)

If, therefore, the grinding millers are "manufacturers" of self-rising flour, it is hard to see why the title should be withheld from respondents, who are engaged in exactly the same operation.

8. Although insisting that they had a right to call themselves "manufacturers" of "self-rising" and "processed" flour, the respondents, before introducing any evidence, and for the purpose of cutting off any possibility of "deception," offered to place on their letter-heads, bags, and invoices, in conspicuous lettering, the words "NOT GRINDERS OF WHEAT." (Rec., pp. 684, 685, p. 20, p. 25, p. 732, p. 770, p. 808, p. 848, p. 883.)

As stated by the Court of Appeals:

> "Early in the proceedings the petitioners (respondents) offered by letter, and again in their amended answers, to add the phrase 'Not grinders of wheat' to their

> trade or corporate names, wherever used, 'to cut off the possibility of deceiving or misleading any purchaser or customer.' No attention was paid to the offer. . . ." (Rec., p. 903.)

It may be added that the Commission entered an order acknowledging receipt of this offer. (Rec., p. 22, p. 735, p. 811, p. 850, p. 885.)

9. It is deemed proper to call attention to another finding of the Court of Appeals, viz:

> "Some of the grinding mills *buy surplus flour from other grinding mills*, and when this is done the purchasers sell the flour *under their own labels*." (Rec., p. 903.) (Italics added.)

In the instant case, nine grinding millers or representatives of grinding mills testified (including Mr. McLemore, the Commission's chief expert), and clearly established the practice. This practice was also fully shown by testimony of flour brokers and by documentary evidence. (Rec., pp. 223, 227, 230, 234, 245, 248 and exhibits 6-13 and 14-18, pp. 249, 571, 572, 566, 625, 557-561 and exhibits 34-50, pp. 531, 535-541, and exhibits 19-28.)

To explain this practice:

There are some 12,000 grinding mills in the United States. To get the best results they must work on a 24-hour basis. This reduces the unit cost and makes a better grade of flour than if they should run 12 hours, and then begin next day with a cold mill. (Rec., pp. 41, 42, 173, 174, 230-233, 234-235, 567, 676-678.) Hence a grinding mill will often have a large surplus of flour which it can afford to sell at, or even below cost, to makers of "self-rising" flour like respondents, or to another grinding mill, in order to obtain the far greater advantage of a 24-hour shift. (Citations *supra*.) Again, the price of wheat may make it cheaper to buy than to grind. (See the calculation illustrating this, Rec., pp. 676-678). Or a hard wheat miller may need soft wheat flour for his customers.

Mr. Cowgill, a grinding miller, testifies:

> "Well, where we sell the hard-wheat miller, where he does not manufacture a soft wheat flour, he puts the

flour we manufacture for him under his mill brands and sells to his trade." (Rec., p. 234.)

The practice is so universal that the U. S. Census blank for grinding mills calls for a report as to "*flours purchased from other mills.*" (Rec., pp. 687-688, and exhibit 73.)

This is, of course, substantially the practice which the Commission has ruled to be deceptive in the case of respondents.

10. The grinding mills are the strongest competitors of respondents.

On this point the Court of Appeals said:

> "The petitioners' (respondents') product, and that of the grinding mills, *are in active competition* in the territory. There is also evidence that petitioners' (respondents') product for some time came into competition with the product of one or two concerns in the same business *which did not represent themselves as mills or milling companies.* This competition, however, was *never substantial,* and it is *doubtful* on the record *if it still exists.*" (Italics added.) (Rec., p. 903.)

There is, in other words, no substantial competition, except with competitors who pursue exactly the same methods as those used by respondents—there are 15 or 20 of these (Rec., p. 92)—and with the grinding millers, who as just shown, to a greater or less extent follow the practice of buying flour and putting it out under their own brands in interstate commerce.

11. The effect of the Commission's order, if enforced, would be *to stifle, rather than to promote, competition,* in this territory.

The Court of Appeals says:

> "There is here manifestly no threat to competition. Such effect as the Commission's orders may have upon the active competition that now exists will be in the direction of *stifling* rather than of preserving it. There

is no oppression of the weak by the strong, *the grinding millers being organized into powerful trade organizations*, and the record wholly fails to establish any injury to the public or any loss suffered by it, either individually or in the aggregate." (Italics added.) (Rec., p. 904.)

12. Another undisputed fact which appears in the record seems to throw some light on the present controversy.

In 1916 the Southeastern Millers' Association endeavored to obtain a ruling from the Interstate Commerce Commission, by which the *"milling in transit" privilege* on self-rising flour (enjoyed alike by the grinding millers and the Nashville producers) would be taken away from the latter. (Rec., pp. 60-63, pp. 668-669, pp. 671-673.)

Under this privilege flour brought in and processed could be shipped in less than car-load lots on the through rate to the Southeastern territory where most of the consumers were located. (Rec., pp. 671-673.) This was a valuable privilege, not only to the Nashville producers, but to the small dealers and consumers in that territory. (Rec., p. 85, pp. 672-673.)

In the trial of that case (*Nashville Flour Transit Rules*, 41 I. C. C., 483), evidence was introduced as to whether the making of self-rising flour was a "milling" process. (Rec., p. 669, p. 62.)

The Interstate Commerce Commission did not find it necessary to decide this point,—observing, however, that:

"The question of how it should be classified is admittedly a close one, open to honest differences of opinion" (41 I. C. C., p. 497).

But the Interstate Commerce Commission was impressed by a fact which seems to have escaped the attention of the Federal Trade Commission, viz, that the making of *self-rising* flour was "in all essential respects the same with the miller as the process by the so-called manufacturer" (41 I. C. C., p. 497).

Its decision was that it would be unjust discrimination for the carriers to give this privilege to the grinding millers while withholding it from the Nashville producers. (41 I. C. C., p. 497.)

The Interstate Commerce Commission further recognized that the proceeding *was essentially a contest between private competitors*, saying on this point:

> "It is obvious that in its last analysis this case represents a contest between what, for purposes of distinction, may be designated as the 'manufacturers' and 'millers' of self-rising flour, with the carriers divided and lined up some with each faction." (41 I. C. C., p. 487.)

It therefore seems reasonable to believe that the present cases are merely another phase of that contest, and that the Federal Trade Commission (whose good faith in the matter is not questioned) has been misled into taking part in another private controversy, just as it was in the *Klesner* case.

Findings unsupported by Allegations in the Complaints or by substantial Evidence.

Certain statements in the petition are based on findings of the Commission which are thought to be beyond the allegations of the complaints, when fairly construed, or unsupported by substantial evidence.

These will be mentioned in the argument which follows.

II.

ARGUMENT.

It is the contention of respondents:

1. That the case made in the Petition and Brief presents a new and different theory from that advanced in the complaints.

2. That the case now made by the Petitioner finds no support in the record:

(a) Because there is no charge in the complaints that many consumers prefer the products of the grinding mills to the similar products of respondents, and believe them to be better, etc.

(b) Because there is no substantial evidence to support the finding of the Commission in this behalf.

3. That the Court of Appeals correctly held that the Commission was without jurisdiction or power to make the orders in question, and correctly set them aside.

These contentions will be discussed in the order noted.

(A)

CHANGE OF POSITION.

In giving the substance of the case made by the complaints, it is said that the Commission alleged:

> "The use of these trade names and representations had the capacity and tendency to lead dealers and prospective purchasers of plain or self-rising flour to believe that they were buying direct from millers or manufacturers and to divert trade from competitors." (Petition, p. 2.)

This statement, by inadvertence, omits what seems to be an important factor.

The case actually stated in the complaints is that the use of these words ("Milling," "Mills," etc.) in the trade names, and "the representation in their business correspondence and otherwise as aforesaid have the capacity and tendency to lead dealers and prospective purchasers of plain or self-rising flour to believe that in purchasing their products they are *buying direct from a miller or manufacturer of flour as above described and without the intervention of the middle man or any element of cost of a middle man's profit* (italics added) and induce purchasers (purchases) of their flour by dealers and *consumers* on that understanding and belief; and said representations constitute unfair methods of competition. . . ." (Italics added.) (Rec., p. 15.)

As will clearly appear, the theory here advanced is that the consumer is injured because he is misled as to the *price* —not because he gets a different article from the one which he wished to purchase.

This is deemed material because it seems to demonstrate that the original theory of "public interest," stated in the complaints, was merely an extension of the doctrine announced in *Federal Trade Commission* v. *Pure Silk Hosiery Mills* (C. C. A., 7, 1925), 3 Fed. (2d), 105 (and in a line of the Commission's own decisions), where it is held to be unfair competition for a merchant, having no plant or machinery of any kind, to describe himself as a "Mill," and to deceive the public by representations that he is engaged in actual manufacture, and *can, therefore, make a better price* than his mercantile competitors.

The theory advanced in the complaints attempted to extend this doctrine to a case *wherein the respondents were making the same article, and with the same machinery* used by their competitors, the grinding mills. (*Ante*, p. 5.)

The theory advanced in the complaints is that the consumer is "injured" because he thinks he is getting a better price.

But the contention which the Commission now seeks to maintain, in its petition and brief, is that the consumer is

"injured" *when he buys an article which he did not intend to buy*—although price and quality may be the same.

This Court has said that

> "the thing which may be prohibited is the *method of competition specified in the complaint.* Such an order should *follow the complaint;* otherwise it is improvident and, when challenged, will be annulled by the Court." (Italics added.)
>
> *Federal Trade Commission* v. *Gratz* (1920), 253 U. S., 421, 427.

The Court has further held that to justify the Commission in filing a complaint under Section 5 of the Act "the *purpose* must be the protection of the public," and that "the public interest must be *specific* and *substantial.*" (Italics added.)

> *Federal Trade Commission* v. *Klesner* (1929), 280 U. S., 19, 27, 28.

A "method of competition" is not within the scope of the Act unless it is such as to involve the "public interest."

> *Fed. Trade Commission* v. *Klesner, supra.*
> *Fed. Trade Commission* v. *Gratz, supra,* at p. 427.
> *Fed. Trade Commission* v. *Raladam Co.* (1931), 283 U. S., 643, 649.

Hence it is submitted that a vital element in charging an unfair method of competition is a showing of "public interest," and that the Commission should be confined to the allegation made on this point in the complaint.

The departure in the present case has just been shown. (*Ante,* p. 11.)

It is further submitted that this contention is not merely technical,—for there was not the slightest effort made to show that *any consumer* was misled by thinking that he or she was *getting a better price* in buying the respondents' products.

Not a single consumer was introduced to prove this.

The case made in the complaint having failed, it is submitted that a new case, based on a finding outside the complaint, should not be made here, to justify the Commission's orders.

(B)

NO ALLEGATION OR EVIDENCE TO SHOW THE "PREFERENCE" CLAIMED.

Assuming, for argument's sake, that the Commission is not precluded from advancing its present theory, we next submit that this theory finds no support in the record.

It is, of course, presumed that the Commission did not mean to present a mere abstract question for discussion. It is here to justify its orders, and to show that under the record they were erroneously set aside. (Petition, p. 7.)

Counsels' theory as to "public interest" assumes the existence of a valid finding, supported by allegation and proof, that "many consumers" (a substantial portion of the consuming public) *have a preference* as between the products of a grinding miller and the similar products of respondents, and *believe the former to be better than the latter.*

A finding in line with this theory was made (Rec., pp. 32-33), but it is respectfully submitted that it is not supported by allegation of the complaints or by substantial evidence.

1. No Allegation.

The essential allegations of the complaints have already been analyzed and shown to present merely the theory that consumers have been led to buy because they believed they were getting a better price, and eliminating a middleman's profit. (*Ante*, p. 11.)

There is (as we respectfully submit) not a suggestion in the complaints that consumers *prefer* to buy self-rising or processed flour from a grinding mill, or that they believe the flour so produced is a *better flour* than the product of these respondents.

2. No Proof.

But irrespective of this, it is submitted that there is a total lack of evidence to show a "preference" on the part of any substantial portion of the consuming public, as between "grinders" and "blenders," and that the Commission's finding on this point is wholly unsupported.

In *Federal Trade Commission* v. *Curtis Co.* (1923), 260 U. S., 568, 580, it was said:

> "Manifestly, the court must inquire whether the Commission's findings of fact are supported by evidence."

This power we now invoke.

The testimony of a great many dealers, wholesale and retail, was taken in this case, and conclusively establishes the proposition that *the general consuming public has no interest as to where the flour comes from*, or whether it is made by a "grinder" or a "blender," but buys flour altogether by brands, just as it buys soap, coffee, or any other standard article.

In support of this statement we ask leave to refer to the following evidence:

McBryar (dealer, Trenton, Ga., 11 years' experience), "Our customers call for it by the brands." (Rec., p. 384.)

Mobley (dealer, Jefferson, Ga., 32 years' experience), "Our customers are influenced by the quality and price just as we are."

> "Q. 30. And do they call for a particular brand?
>
> "A. Yes, sir.
>
> "Q. 31. In other words, the housewife buys flour and likes it, and then comes back and asks for that brand?
>
> "A. That is the idea." (Rec., p. 391.)

On cross-examination:

"X. 73. Does your trade know, Mr. Mobley, that it is buying flour from a blender rather than from a mill, when you sell them Watauga Milling Company's goods, or goods marked with the Watauga Milling Company's name?

"A. *I do not think that would influence them at all.*" (Rec., p. 397.)

Further testifies:

"X. 71. *Don't you know that some of your trade have quite a prejudice against what is termed blended flour?*

"A. *No, sir.*" (Rec., p. 397.)

The following colloquy sheds light on this point:

"EXAMINER SHEPPARD: Mr. Skillern, do customers ever come into your store and demand flour by the name of the manufacturer?

"A. No, sir.

"EXAMINER SHEPPARD: Or a blender, as the occasion might be?

"A. No, sir.

"EXAMINER SHEPPARD: *Are they interested as to who the manufacturer may be?*

"A. *No, sir; they just call for it by the name of the brand.*

"EXAMINER SHEPPARD: By the brand name?

"A. Yes, sir." (Rec., p. 507.)

(*Note*: Witness is a dealer in Summertown, Tennessee, with 16 years' experience.) (Rec., p. 507.)

In the testimony of *J. M. Whiteside*, a Mississippi merchant, doing an annual business of from one and a half to two million (Rec., p. 516), the following occurred:

"EXAMINER SHEPPARD: Just one question. I understand you have had a broad experience in selling groceries to the public?

"A. I have sold groceries for quite a while.

"EXAMINER SHEPPARD: What is your opinion as to whether or not the average customer who comes into your store for the purpose of buying flour, are they interested in the manufacturer or blender of the flour?

"A. No, sir. *The average customer don't know who makes the flour,* is my experience.

"EXAMINER SHEPPARD: He is interested in the brand?

"A. *He buys by the brand,* the brand that gives him satisfaction." (Rec., p. 519.)

So in the examination of *Roy McDonald,* manager of 41 chain stores in and near Chattanooga, Tennessee, doing an annual business of over a million and a half dollars (Rec., p. 529), the following took place:

"EXAMINER SHEPPARD: Just one question. From your experience in handling goods and the public, I want your opinion as to whether or not the public, the average customer, is interested in the manufacturer or mixer from whom the flour came?

"A. I think I am well qualified to answer that question. I started selling groceries when I was eleven years old. What time I was not in school you might say, I jumped counters selling groceries direct to the customer. I have been in what I would think was intimate contact with the customer, and have since tried to maintain that contact. *The customer is merely interested in the satisfaction which she gets from the sack of flour,* which they bought. *They may buy one sack of flour and try a brand, and if it is satisfactory they will come back for it.* My private brand of flour, and which I naturally want to maintain on a high standard of quality, if the sack of flour does not come up to their expectations regardless of what the reason is, *they will not buy that sack of flour a second time. . . .*" (Witness then tells of the guaranty which he makes in selling flour.) (Rec., p. 530.)

To the same effect see the testimony of the following witnesses:

Sherrill, dealer, Hartselle, Ala., 30 years experience (Rec., p. 405).

Cannon, dealer, Spartanburg, S. C., 23 years experience (Rec., pp. 409-410).

Hughes, dealer, Huntsville, Ala., 5 years experience (Rec., p. 413, "By the brand").

Lisle, dealer, Opelika, Ala., 8 years experience (Rec., p. 422, "By name, by brand").

Jackson, dealer, LaGrange, Ga., 4 years experience, ("By brand, as for Clover Leaf, Silver Dawn, *as if asking for Maxwell House or Arbuckle's Coffee*"). (Rec., p. 426.)

Bryant, dealer, Collinwood, Tennessee, 2 years experience (Rec., p. 445), ("They just come in and ask for the name of the flour.")

Rogers, dealer, Nashville, Tennessee, 4 years experience (Rec., p. 449).

Rottero, dealer, Nashville, Tennessee, 17 years experience (Rec., p. 455). ("The name of the flour").

Campion, Rec., p. 461, Manager Piggly-Wiggly Stores, Nashville, Tennessee, 8 years experience ("Particular brands").

Coode, Rec., p. 466, former President National Association of Retail Grocers, dealer, Nashville, Tennessee, 39 years experience ("Specify the brand name").

Schutt, dealer, Nashville, Tennessee, 34 years experience, Rec., p. 470 ("Call for the brand they want").

Hall, dealer, Birmingham, Ala., 9 years experience, Rec., p. 473 ("Ask for it by name").

Gupton, dealer, Nashville, Tennessee, 10 years experience (Rec., p. 480).

Schafer, dealer, Little Rock, S. C., 20 years experience, Rec., p. 489 ("By brand, as for soap, coffee, or canned goods").

Bannon, dealer, McEwen, Tennessee, 7 years experience, Rec., p. 493 ("Just like they ask for Octagon Soap, Arbuckle's Coffee, and things like that").

Murff, dealer, Ashland City, Tennessee, 24 years experience, Rec., p. 498 ("By name").

White, dealer, St. Joseph, Tennessee, 8 years experience, (Rec., p. 503 ("By name, practically all of them").

Clayton, dealer, Lawrenceburg, Tennessee, 20 years experience, Rec., p. 513 ("Ask certain brands").

Hensley, dealer, Iron City, Tennessee, 6 years experience, Rec., p. 521 ("For certain brands").

Culpepper, dealer, Meridian, Miss., 8 years experience, Rec., p. 527 (Annual business $600,000—"by brand, as a rule").

Cassels, dealer, Ellinton, S. C., Rec., p. 579 ("Give me a sack of good flour").

Lovingood, dealer, Murphy, N. C. (Rec., p. 586).

Walker, dealer, Andrews, N. C., 6 years experience (Rec., pp. 587-588).

Ketner, dealer, Waynesville, N. C., 25 years experience (Rec., pp. 592-593).

Williams, dealer, Greenbrier, Tennessee, 15 years experience, Rec., p. 597 ("By the brand").

Murphee, dealer, Nashville, Tennessee, 17 years experience, Rec., p. 608 ("Some by name, some for good flour").

Bumpus, dealer, Nashville, Tennessee, 7 years experience, Rec., p. 610 ("By the name").

Sneed, dealer, Nashville, Tennessee, 16 years experience, Rec., p. 612 ("Some for good flour, most for a brand").

Vantrease, dealer, Nashville, Tennessee, 2 years experience (Rec., p. 615).

Gower, dealer, Nashville, Tennessee, 30 years experience (Rec., p. 617).

Smotherman, dealer, Nashville, Tennessee, 12 years experience, Rec., p. 619 ("Some for good flour, some by name").

Fehr, Rec., p. 622, President Nashville Retail Merchants' Association, 13 years experience ("Usually by the brand").

Pardue, dealer, Nashville, Tennessee, 10 years experience, Rec., p. 624 (Particular brands, or sack of good self-rising or plain flour).

Not a single dealer was put on the stand by the Commission to rebut this evidence.

Evidence of Consumers.

In line with this testimony of dealers, respondents introduced *ten Nashville housewives*, all of whom testified that they bought flour *by the brand.* (Rec., p. 547, p. 550, p. 551, p. 552, p. 553, p. 554, p. 555, p. 556.)

Only one of these was cross-examined at any length, and she testified on the question of preference:

> "X-10. Have you not *any preference* as to whether or not you would rather have flour made by a blender as I have described to you or from a concern that actually grinds the wheat into flour?
>
> "A. *I do not know that I know the difference.*
>
> "X-11. Who makes 'Queen of the Pantry'?
>
> "A. I do not know.
>
> "X-12. Do you know who makes 'Gloria' flour?
>
> "A. No, sir.
>
> "X-13. Do you know who makes any of them?
>
> "A. No.
>
> "X-14. Do you know what name appears on the sacks?
>
> "A. Yes.
>
> "X-15. What names?
>
> "A. 'Martha White,' 'Gloria,' 'Queen of the Pantry.'
>
> "X-16. Does the name of the manufacturer making the flour appear on the sack or do you know?
>
> "A. I just don't know." (Rec., pp. 549-550.)

The Commission introduced three consumers (Nashville women), but *only one was asked as to her preference.* This was Mrs. *Canfield,* who says—not that she has a preference—but

> "I should *think* it *would be* better to buy from the mills that grind it." (Rec., p. 285.)

But almost immediately afterward:

> "Q. Do you know, Mrs. Canfield, that there was *any such thing* in the flour industry *as a blender?*
>
> "A. *No, sir.*" (Rec., p. 285.)

Thus the lady could have had no preference—for she did not know the difference between them.

This was absolutely demonstrated, because she said she used four kinds of flour, "Flora," "Martha White," "Gloria," and sometimes "Polly Rich" (Rec., p. 285), and that all of them have been satisfactory (Rec., p. 286).

Two of these ("Gloria" and "Martha White") are made by respondents, and the third ("Polly Rich") was introduced and made popular by a "blender." (Rec., p. 601.) Yet witness was using them all with perfect satisfaction.

It is therefore respectfully submitted that if all questions of pleading are laid aside, *there is no evidence at all* —much less any substantial evidence—to support the Commission's finding, and its present theory. All the evidence is the other way.

Commission's Theory Impossible.

This uncontradicted evidence, it is submitted, is in line with reason and common sense.

There is no theorizing about an article of food, provided it is wholesome. People eat what they like; and a regiment of cereal chemists would waste their time in demonstrating to a housewife that "Queen of the Pantry" flour makes better biscuit, when she and her family prefer "Martha White."

It is admitted that all brands are wholesome; and consumers buy the particular brands which appeal to their individual tastes.

A different rule may possibly obtain with regard to shoes, or cosmetics, or clothing, where other considerations—elements of beauty, fashion, etc.—may enter into the case.

But there can be no abstract or theoretical preference about a biscuit.

(C)

THE ORDERS WERE PROPERLY SET ASIDE.

In the Court's latest opinion it was said:

> "By the plain words of the act, the power of the Commission to take steps looking to the issue of an order to desist depends upon the existence of three distinct prerequisites:
>
> "(1) That the methods complained of are *unfair;* (2) that they are methods of *competition* in commerce; and (3) that the proceedings by the Commission to prevent the use of the methods appears to be the *interest of the public*" (Court's italics).
>
> *Federal Trade Commission* v. *Raladam Co.* (1931), 283 U. S., 643, 646-647.

The present petition deals only with the last mentioned element—and without conceding that the first two elements of jurisdiction have been established (for we do not believe this to be true), we shall address our argument to the third requisite.

AS TO "INTEREST OF THE PUBLIC."

It is respectfully submitted that the Federal Trade Commission cannot bring these cases here merely because the Court of Appeals may have made an erroneous statement.

It is here seeking a reversal of that Court's decree, and a reinstatement of its own orders (Petition, p. 7)—not to have a mere declaration of rights.

To sustain these orders here, the Commission must affirmatively show that the public interest is involved. (*Fed. Trade Commission* v. *Raladam Co., supra,* at p. 649.) It has accordingly advanced such a theory, and we have endeavored to show that it is without basis in the record. (*Ante,* p. 13, *et seq.*)

If we are correct in this, *the Commission's present contention involves merely an abstraction.*

We are, nevertheless, convinced that even as to this abstract legal proposition, the contention made by the Commission is untenable.

The test, as we see it, is this:

The public interest is not involved so as to give the Federal Trade Commission jurisdiction, unless the public is "*injuriously*" affected. Such interest cannot be merely fanciful or theoretical. It must be "specific and substantial." (*Fed. Trade Commission* v. *Klesner*, 280 U. S., at p. 29; *Fed. Trade Commission* v. *Raladam Co.*, 283 U. S., at p. 649.)

In the instant case there can be no real and substantial interest in the consuming public, when it buys altogether by brands—neither knows nor cares who makes the article,—and where the commodity, whether made by the so-called "miller" or the so-called "blender," is essentially the same, and is sold strictly on its merits, as developed by the most practical and convincing of all tests.

This, as we have endeavored to show (*Ante*, p. 20), is inevitably true in the case of a food article like flour, but it is believed that the same rule—viz, that the public must be "injuriously" affected—should obtain in all cases.

All the opinions of the Court, as we interpret them, are consistent with this contention.

Thus in *Federal Trade Commission* v. *Winstead Hosiery Co.* (1922), 258 U. S., 483, the complaint was sustained because there was a direct injury to the consuming and purchasing public. Goods were branded "Natural Merino," "Gray Wool," "Natural Worsted," or "Australian Wool," much of which "contains only a small percentage of wool; some as little as ten per cent." (P. 490.) As a result of this, the public was misled "*into buying, as all-wool, underwear which is in large part cotton.*" (P. 492.) (Italics added.)

Or, as explained in the *Klesner case*, "an unfair practice was suppressed because it *affected injuriously* a substantial part of the purchasing public." (280 U. S., p. 28.)

And in the *Raladam Company* case: "Part of the public was thereby misled into selling or into buying, as all wool, underwear which was in large part cotton. The labels were false, and calculated to deceive, and did, in fact, deceive, a substantial part of the purchasing public." (283 U. S., p. 651.)

The actual injury involved seems too apparent for discussion.

In the *Raladam Company* case, *supra*, the Court (as we interpret its opinion) thought that the element of public interest was present because of *possible physical injury* to users of the patent medicine. Thus it was said:

> "Findings, supported by evidence, warrant the conclusion that the preparation is one which cannot be used generally *with safety to physical health* except under medical direction and advice. If the necessity of protecting the public *against dangerously misleading advertisements* of a remedy sold in interstate commerce were all that is necessary to give the Commission jurisdiction, the order could not be successfully assailed. (283 U. S., p. 646). (Italics added.)

In the *Klesner* case, *supra*, as the Court was careful to point out:

> "It is not claimed that the article supplied by Klesner was *inferior* to that supplied by Sammons, or that the public suffered otherwise *financially* by Klesner's use of the words 'Shade Shop.'" (280 U. S., p. 28.) (Italics added.)

So in a case under the other phase of the Federal Trade Commission Act, the Court said that the acquisition of stock in a competitor must affect competition "to such a degree as will *injuriously affect the public.*" (Italics added.)

> *International Shoe Co.* v. *Fed. Trade Commission* (1930), 280 U. S., p. 298.

It is, therefore, submitted that the language of the lower Court here criticized by the Commission, is in line with the opinions of this Court.

Decisions of the Courts of Appeal.

It is believed that the insistence of respondents is further supported by the best considered cases in the Courts of Appeal.

Petitioner seems to lay stress on a statement made in the case of *Ohio Leather Co.* v. *Federal Trade Commission* (C. C. A., 6, 1930), 45 Fed. (2d), 39, 41; but the actual decision was that the case must go back for further evidence and findings as to whether the purchasing public was *"misled to its prejudice."* The Court said:

> "Upon this subject—what the retail shoe buying public understands by 'kid,' and whether it is, in fact, *misled to its prejudice* by the use of this term 'Kafer-Kid'—the record is very unsatisfactory; and we think no final disposition of the controversy should be based upon it. The order cannot be sustained in the absence of an affirmative finding, based upon substantial evidence, to the effect that the consuming public, asking for kid shoes, *desires to get shoes made from the skin of a kid or goat*, as the case may be. The present record being insufficient, it should be remanded, in order that all parties interested may take further proofs and have a finding made, if indeed, the proofs may then justify any definite conclusion." (P. 41.) (Italics added.)

The Court then observes, *arguendo:*

> "The misleading of the ultimate public to its prejudice does not, of course, depend upon whether the substitute is equally as good as the original; the purchaser is entitled to get what he asks for, even if he is put off with something as good or better. . . ." (P. 41.)

As to this case, it is submitted:

(a) That the opinion of the same Court in the instant case is, of course, a later decision, and shows that the Court of Appeals did not regard the *Ohio Leather Co.* case as controlling this case.

In the *Ohio Leather Co.* case *calf* skin was sold for *goat* skin—two articles entirely different in the raw material,

however much the finished products made from the two might resemble each other.

(b) The observation, as broadly construed by the Commission, is in conflict with previous opinions of the same Court.

In the case of *L. B. Silver* v. *Fed. Trade Commission* (1923), 289 Fed., 985, it was shown that L. B. Silver and his successors in business had openly and persistently, for half a century prior to the filing of the complaint by the Commission, claimed that the "Ohio Improved Chesters" were a different breed of hogs from "Chester White."

After touching on certain other phases of the matter, the Court said (p. 989):

> "Aside from these considerations, it is apparent from the evidence in this case that *this controversy does not vitally concern the general purchasing public.* On the contrary, *it is a controversy largely between rival breeders of hogs,* or more particularly between rival hog breeders associations having and maintaining herd books. If the O. I. C. hogs were *inferior* to the Chester Whites and not of their breed and the petitioner advertised them as Chester Whites, such practice would, no doubt, constitute unfair competition as against Chester White breeders; but it is admitted that not only are the O. I. C. hogs *superior* to the Chester White hogs of 1863, but that they are the *equal* of the Modern Chester Whites. That being true, *it necessarily follows that neither the general public as consumers nor the small part of the public engaged in the breeding of swine and particularly in the breeding of O. I. C. and Chester White swine can be misled to their prejudice by this claim of the petitioner, nor induced thereby to purchase a hog inferior to the Modern Chester White* . . ." (Italics added.)

Again, in the case of *Berkey & Gay Furniture Co.* v. *Federal Trade Commission* (C. C. A., 6th, 1930), 42 Fed. (2d), 427, the Commission filed its complaint against a furniture manufacturer, alleging that veneered furniture was sold as solid mahogany or solid walnut. (P. 428.)

It was disclosed by the record "without dispute" that the finest modern furniture having exposed flat surfaces (tables, desks, etc.), is constructed "of laminated wood, with the grains of the various layers running in different directions so as to prevent cracking and warping, and with a layer of walnut or mahogany veneer secured to the exposed surface." The Court further says that "such is the only practical way of constructing flat surfaces of large area, and all of the beautiful effects of matched graining may be obtained only in this manner." It was also disclosed by the record that "all furniture of the better quality has its flat surfaces constructed of ply wood, or laminated and veneered woods, and that only the cheaper and poorer grades of less valuable material are constructed of solid wood." (P. 429.) It appeared that the respondent in its catalogues and "tags" was accustomed to describe such furniture as "mahogany" or "walnut," and one of the points discussed was whether this gave retailers an opportunity to *deceive the purchasing public.* As to this the Court said:

> ". . . To all but the grossly uninformed of the public it has no such tendency. It does not reasonably follow that, even as to this small fraction of the uninformed, the ignorance and mistake, *which results in their getting a better article,*—a more beautiful, more durable and more serviceable piece of furniture,—should be characterized as deception, fraud, or even unfairness, or that *injury to the public interest* is thereby shown." (P. 430.) (Italics added.)

The public may have been "deceived," but it could not have been "injuriously affected" by purchasing a superior article.

In this connection it is submitted that the mere fact that customers are *deceived* is *not* sufficient to show public interest.

> "This requirement" (*i. e.*, public interest) "is not satisfied by proof that there has been *misapprehension and confusion* on the part of purchasers, or even that they have been *deceived,*—the evidence commonly adduced by the plaintiff in 'passing off' cases in order to establish the alleged private wrong." (Italics added.)
>
> *Fed. Trade Commission* v. *Klesner,* 280 U. S., p. 27.

The above observation in the *Klesner* case seems a sufficient answer to *Federal Trade Commission* v. *Balme* (1928), 23 Fed. (2d), 615, 620, from which an excerpt is quoted in Petitioner's Brief (p. 12).

That case (it is submitted) was treated by the Court of Appeals for the Second Circuit as if a trade-mark case and a case under the Federal Trade Commission Act were governed by precisely the same principles; and most of the authorities reviewed relate to trade-marks, or unfair competition in equity. Thus it was said:

> "The inquiry is whether there is actual confusion, which is brought about by the simulation of one person's goods for another." (23 Fed. (2d), p. 621.)

This is certainly *not* the inquiry in a Federal Trade Commission case, where "to justify the Commission in filing complaint under Section 5, the *purpose* must be protection of the public. The protection thereby afforded to private persons is the *incident*." (Italics added.)

(*Fed. Trade Commission* v. *Klesner, supra*, at p. 27.)

The *Balme* case apparently construed *Fed. Trade Commission* v. *Winstead Hosiery Mills* as a mere case of *misbranding* (p. 620)—but any such view seems wholly inconsistent with the subsequent explanation of this Court in the *Klesner* case (*Ante*, p. 22), and its opinion in the *Raladam Company* case, (283 U. S., at p. 649).

The other cases cited by petitioner—*United States* v. *95 Barrels of Vinegar* and *Pillsbury* v. *Pillsbury Washington Flour Mills* (Petition, p. 13)—arose respectively under the Pure Food and Drugs Act and under the equity law of unfair competition, and this alone would seem enough to distinguish them.

In the first case, this Court said:

> "The statute applies to food, and the ingredients and substances contained therein. It was enacted to enable purchasers to buy food for what it really is." (265 U. S., p. 443.)

And further:

> "If an article is not the identical thing that the brand indicates it to be, it is misbranded." (265 U. S., p. 444.)

The case, therefore, was decided under the precise and unyielding terms of the Pure Food Act.

The excerpt made from the *Pillsbury Flour case* (Brief, pp. 13-14), was merely a dictum; for the Court, in the next sentence, went on to say:

> "We are forced to believe that appellants have put on the market *an inferior brand of flour* (Italics added), and in order to dispose of it profitably to themselves have placed upon it this false and simulated brand. . . ." (64 Fed., p. 848.)

And further:

> "They appeal to the greed of their customers to purchase *an inferior quality of flour* (Italics added), thus falsely branded with the name of a superior article. . . ." (64 Fed., p. 849.)

In the present case it is *conceded* in stating the question presented for decision, *that there is no finding or proof of inferiority.* (Commission's Brief, p. 10.) It may be added, that there is *no such charge in the complaints.*

It is, therefore, respectfully submitted that if there were any evidence at all to show the alleged preference of the consuming public—and there is none—the abstract principle for which the Commission contends is unsound; and that a mere deception—a theoretical injury, as distinguished from a physical or financial injury—is insufficient to sustain jurisdiction under Section 5 of the Act.

CONCLUSION—OTHER POINTS ANSWERED.

In concluding the argument, certain other points made by the petitioner will be briefly discussed.

1. Private Controversy.

It is said in the Petition (p. 9) that the *Klesner* case cannot apply, because (a) the respondents' representations do not involve any private rights, and (b) because that case "involved a controversy between two competitors of an essentially private nature."

(a) As to the first proposition the petitioner relies on *Royal Baking Powder Company* v. *Federal Trade Commission* (C. C. A. 2nd, 1922), 281 Fed., 744, 750.

The Court of Appeals in that case apparently construed the opinion in *Federal Trade Commission* v. *Winstead Hosiery Co.*, 258 U. S., 453, as conferring jurisdiction on the Commission in any case of misbranding, or deceptive labeling. Thus it is said, after reviewing that case:

> "The labeling of commodities in such way as to deceive the public is an unfair method of competition." (281 Fed., 752.)

We do not understand that subsequent opinions of this Court (and especially *Federal Trade Commission* v. *Klesner*, and *Federal Trade Commission* v. *Raladam Co.*), sustain such an interpretation of the Act.

There may even be cases where customers are *deliberately deceived* by falsely representing goods as those of a competitor, and yet the Commission may be without jurisdiction. This was the decision in *Federal Trade Commission* v. *Klesner, supra.*

(b) As to the second point:

We are unable to perceive that *Federal Trade Commission* v. *Klesner* is based on geographical limitations, or on the number of competitors involved.

There is certainly a purchasing public to be protected in the District of Columbia. And if the decision rests merely

on the fact that only two competitors were involved (who had engaged in a previous suit), why did the Court lay down the general rules already quoted? And why has the case since been treated by the Court as establishing these general principles?

It is submitted that the Court of Appeals correctly held that this was essentially a private controversy between two groups—the organized millers on the one hand and the Nashville producers on the other—just as the Interstate Commerce Commission had previously held in the "Milling in transit" case (*Ante*, p. 9).

2. As to Respondents' Offer.

Early in the proceeding the respondents offered to place in conspicuous lettering on all bags, containers, letterheads, etc., the words "NOT GRINDERS OF WHEAT." (*Ante*, p. 5.)

As to this the petitioner says that if they falsely labelled themselves as mills "there would be no reason for permitting the misrepresentation followed by a disavowal." (Brief, p. 15.)

This, of course, ignores the element of good will under these trade names, built up over a long series of years during which nobody questioned the right to use them.

Royal Milling Company, for example, was established under the name in *1902* (Rec., p. 23), long before the grinding mills had entered into the "self-rising" flour business, and while they were still opposing the product (*Ante*, pp. 4-5). It is stipulated that the present proprietors paid $7,500.00 for the good will in *1917*. (Rec., p. 23.)

Nashville Roller Mills, a corporation, was established in *1905* as a wheat grinding mill, and when its plant was burned in 1913, it was rebuilt as a self-rising flour plant. (Rec., p. 714.)

Naturally all the respondents wish to preserve their good will.

While no decision of this Court has been found, it has been held in the lower Federal Courts, that the use of such explanatory words permits the use of a trade name or trade mark which might otherwise be deceptive.

N. Fleugelman & Co. v. *Federal Trade Commission* (C. C. A., 2, 1930), 37 Fed. (2d), 59, 61.

(Right upheld to use the word "Satin-Maid" as a trade mark on products in fact made from cotton, where there appear in equally conspicuous lettering the words "a cotton fabric," "a cotton satin," "*no silk*," or equivalent modifying terms.)

Federal Trade Commission v. *Cassoff* (C. C. A., 2, 1930), 38 Fed. (2d), 790, 791.

(Manufacturer labelled his products "White Shellac," and "Orange Shellac," but stated on labels and advertising matter: "This is not 100 per cent India Shellac, it is composed of substitute Shellac and India Shellac.")

And see *Federal Trade Commission* v. *Goodgrape Co.* (C. C. A., 6, 1930), 45 Fed. (2d), 70, 72.

(Company ordered to desist from use of words "Goodgrape" or "Grape," "unless in the same connection it is made prominently to appear that the product is an imitation artificially colored and flavored.")

No authority is cited by the Commission for its present position, and so far as we can find, none exists.

3. Conduct of Competitors.

In *Federal Trade Commission* v. *Raladam Co., supra*, the Court said:

> "The Court below thought that the trade to be protected 'was that legitimate trade which was entitled to hold its own in the trade field without embarrassment from unfair competition.' There is much force in this conception of the act, and the language just quoted from the *Winsted* case seems inferentially to lend it support. Certainly, it is hard to see why Congress would set itself to the task of devising means and creating

> administrative machinery for the purpose of preserving the business of one knave from the unfair competition of another." (283 U. S., p. 652.)

While we do not think that the Court's very expressive and pungent phrase applies to either faction in this case—for the record shows no *injurious* deception by either—yet both are in the same situation.

The grinding millers, as previously shown (*Ante*, p. 6), are very generally engaged at times in the same practice which the Commission says is deceptive in the case of respondents.

When grinding mills competing in this very territory are buying flour and putting it out under their own brands (Rec., pp. 247-249, pp. 571-572, p. 566, pp. 557-558, *Ante*, p. 6, *et seq.*), it would seem difficult to justify the Commission's action in ordering respondents to give up their long established trade names for the sole benefit of such competitors.

4. No Injury to Competition shown.

In affirming the case of *Raladam Company* v. *Federal Trade Commission* (45 Fed. (2d), 430), this Court stressed the necessity of injury to legitimate competition.

> (*Fed. Trade Commission* v. *Raladam Co.*, 283 U. S., pp. 647, *et seq.*)

The Court of Appeals, as previously shown, made a strong finding on this point (Rec., p. 903, 904, *Ante*, p. 7, p. 8), and reached the conclusion that the Commission's orders, if carried out, would stifle rather than promote the existing active competition. (Citations, *supra.*)

Flour is purchased almost exclusively by brands (*Ante*, p. 14), and there is no attempt to show that respondents are imitating the brands or containers of the grinding millers.

Certainly it is not a case (as the Court of Appeals points out), of protecting the weak against the strong. Indeed, the shoe would seem to be on the other foot, when the powerful organization of the grinding mills is considered. The Commission seems bent on protecting the strong, and that

too, when they are merely the *imitators and followers* in the competitive field. (*Ante*, p. 4.)

These cases, it is submitted, are not only without the letter, but without the spirit, of the Federal Trade Commission Act.

The purpose of the Act, as just shown, is to encourage competition, and to prevent monopoly.

The Nashville producers and their predecessors, in making what was essentially the public's fight—a fight for a better product at a reduced cost—were first attacked by a campaign of misrepresentation (*Ante*, p. 4), and then by the powerful Southeastern Millers' Association in the "Milling in transit" case (*Ante*, p. 8), but without success.

If the decision of the Court of Appeals should be reversed, and the Commission's orders re-instated, it will necessarily injure the respondents financially, and do much to take away their prestige as competitors.

Cui bono?

The answer is not far to seek: For the sole benefit of a powerfully organized commercial body, and to the ultimate injury of existing competition and of the consuming public.

Respondents ask that the writ be denied.

Respectfully submitted,

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October, 1932.